UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

GREGORY P. STONE, Appellant, v. DEPARTMENT OF THE ARMY, Agency.	DOCKET NUMBER NY07528710131 DATE: MAY 9 1988

Paul J. Hayes, National Association of Government Employees, Latham, New York, for the appellant.

J. Ellen Purcell, Esquire, Watervliet, New York, for the agency.

BEFORE

Daniel R. Levinson, Chairman
Maria L. Johnson, Vice Chairman

OPINION AND ORDER

The appellant's union representative[1] has petitioned for review of an initial decision dismissing the appellant's petition for appeal from the agency action removing him from his position as a Supply Clerk for want of

[1] The appellant's representative has asserted that the appellant is now deceased. The agency has not disputed this representation and, although there has not been a timely-filed motion to substitute parties, the Board finds that the continued adjudication of the appeal is appropriate since the interest of the proper party (the estate of Gregory P. Stone), will not be prejudiced by our action. 5 C.F.R. § 1201.35.

jurisdiction. For the reasons set forth below, we hereby GRANT the appellant's petition for review, REVERSE the initial decision, and REMAND the appeal to the New York Regional Office for full adjudication of the appeal.

BACKGROUND

On October 31, 1986, the agency proposed the appellant's removal based upon the following four current charges: (1) Leaving the arsenal grounds without permission; (2) AWOL, 15 minutes, 21 October 1986; (3) leaving the worksite without permission; and (4) AWOL, 30 minutes, 24 October 1986. The appellant's prior disciplinary record consisting of five prior suspensions, including a sixty day suspension in October 1984, for leave related abuses was considered by the agency proposing and deciding officials in arriving at the penalty of removal. Appeal File , Tab 4, Vol. I, Subtab 7.

On November 14, 1986, the appellant filed a written reply to the proposal to remove him from his position, stating that the proposal was "unfair and unjustified" and informing the agency that he was being represented by "Paul J. Hayes, National Vice President of NAGE." Appeal File, Tab 4, Vol. I, Subtab 9. The appellant's representative also noted, on that response, that the time afforded for a response was inadequate. In response to the appellant's claim that the reply time was inadequate, the agency attempted to ascertain from the appellant how much time was

necessary, but both the appellant and his representative refused to provide a further reply or to state how much more time was necessary. Appeal File, Tab 4, Vol. I, Subtabs 11, 12, 13, and 14. By letter dated December 8, 1986, the appellant was notified that he would be removed effective December 12, 1986. Appeal File, Tab 4, Vol. I, Subtab 16.

On December 15, 1986, Joseph F. Ventresca, President of NAGE Local R2-98, filed a complaint of "Contract Violation" with the Commander of the Watervliet Arsenal (the facility at which the appellant was employed), asserting that the agency had violated Section 4 of Article 8 and Section 3 of Article 28 of the collective bargaining agreement by its processing of the appellant's removal. Appeal File, Tab 4, Enclosure 1. No specific invocation of the grievance procedure or request for arbitration of the disciplinary action against the appellant under the grievance procedure was made by Mr. Ventresca. Mr. Ventresca was not the appellant's specifically designated representative and the appellant did not provide NAGE a general designation which would permit it to substitute representatives without the appellant's specific authorization. *See* Appeal File Tab 4, Vol. I, Subtab 9.

On December 19, 1986, the appellant signed and his designated representative, Paul J. Hayes, filed a timely petition for appeal with the Board's New York Regional Office. The appeal form signed and filed by the appellant

denied that he, or anyone acting on his behalf, had filed a grievance challenging his removal. Appeal File, Tab 1.

On January 16, 1987, the agency moved to dismiss the petition for appeal, asserting that the filing made by Mr. Ventresca constituted an election by the appellant to utilize the grievance and arbitration procedure under Article 35, Section 8 of the Negotiated Agreement to challenge the agency's disciplinary action against the appellant. The appellant responded to the agency motion asserting, in essence, that: (1) He had no knowledge of and had not authorized the local union to file a grievance relating to his removal; (2) he had not elected to utilize the grievance procedure; (3) the union had an independent right to initiate a contract dispute when the agency violated the negotiated agreement; and (4) he had elected to appeal his removal to the Board. Appeal File Tabs 7, 8.

The administrative judge granted the agency's motion to dismiss in an initial decision dated February 10, 1987. He found that the appellant's union had invoked the negotiated grievance procedure established by the collective bargaining agreement between appellant's union and the agency. The administrative judge also found that the appellant had chosen to be represented by his union prior to the effective date of the action and that the union's action initiating a grievance proceeding was binding upon him.

In the petition for review filed on appellant's behalf, the appellant's representative challenges, *inter alia*, the administrative judge's determinations that: (1) The appellant or his designated representative had elected to utilize the grievance procedure rather than appealing to the Board; (2) the appellant had designated his union as his representative; and (3) the union action asserting that the agency action relating to the appellant violated the terms of the collective bargaining agreement and demanding that the agency cancel that action constituted an election of the grievance procedure.

ANALYSIS

1. The appellant did not designate his local union, the National Association of Government Employees-Local R2-98, as his representative and he cannot be bound by their actions.

The appellant's representative, Paul J. Hayes, asserts in the petition for review that the administrative judge erred in finding that the appellant had designated or authorized the local union or its president, Joseph F. Ventresca, as his representative for purposes of challenging the agency action removing him from his position. Mr. Hayes also asserts that the actions of the local union or its officers, which were taken independently and without the authorization of the appellant, cannot bind the appellant. We agree.

Appellant's November 14, 1986 letter to the agency's deciding official states, unequivocally, that he is "being represented by Paul J. Hayes, National Vice President of NAGE." Appeal File Tab 4, Vol. I, Subtab 9. Our review of the record in this appeal fails to disclose any evidence that the appellant either revoked this designation of representative or expanded it to include Mr. Ventresca or the local union as his representatives. In the absence of a specific designation by the appellant of the local union or its officers as his representatives, the administrative judge's finding was erroneous.

Similarly, the administrative judge's reliance upon the Board's decision in *Sofio v. Internal Revenue Service*, 7 M.S.P.R. 667 (1981), to find that the appellant was bound by the action, inaction, errors, or neglect of the local union or its officers was misplaced. Since the appellant did not choose to be represented by the local union or its officers, the actions of the local union or its officers cannot accrue to his detriment.

The agency representative's continued assertions that the appellant chose to be represented by "the union" and is bound by the actions of the local union and its officers is disingenuous. There is no evidence in the record to support the contention by the agency representative that the appellant chose to be represented by anyone other than Paul J. Hayes, a National Vice-President of NAGE. Indeed, the

evidence submitted to the administrative judge by the agency demonstrates that the agency was well aware of the fact that the appellant had not made a general designation of the local union as his representative at the time it was making this assertion. *See* Appeal File Tab 4, Vol. I, Subtab 9.

The agency's reliance on the Board's decision in *Morales v. Department of Justice*, 31 M.S.P.R. 167 (1986), is also inappropriate. In *Morales*, the Board held that the appellant had elected to utilize the negotiated grievance procedure because she had specifically designated her local union as her representative and the vice-president of the local union had specifically invoked arbitration of that appellant's removal under the applicable negotiated grievance procedure. Even if the Board's decision in *Morales* could be construed as supportive of the agency's position, the Board's decision was reversed by the United States Circuit Court for the Federal Circuit in *Morales v. Merit Systems Protection Board*, 823 F.2d 536 (Fed. Cir. 1987). In reversing the Board's decision, the Federal Circuit concluded that an employee will not be bound by a union's action electing to utilize a negotiated grievance procedure unless the employee subsequently ratifies the union's action stating, at 538, that:

> Where, as in this case, the union elects arbitration on behalf of an employee, when the notice of appeal rights issued by the agency pursuant to regulation specifically mandates the employee's authorization prior to such election, we

> hold that the election is contrary to the regulation under which the notice is required. 5 C.F.R. § 752.404(f) (1985). In such circumstances, the union's election of arbitration is void unless it is subsequently ratified by the employee.

There was no subsequent ratification of the union's action in the instant case. Indeed, the appellant consistently asserted that he was not bound by the local union's action and that he did not designate the local union as his representative.

2. Neither the appellant nor his designated representative elected to utilize the grievance procedure to challenge the agency removal action.

There is no evidence in the record to support the agency's contention and the administrative judge's finding that the appellant or his representative chose to utilize the grievance procedure established by the collective bargaining agreement rather than appeal to the Board. Indeed, both the appellant and his representative have consistently denied that either or both had taken any action which could be construed as an election to utilize the grievance procedure to challenge the agency's action.

A perusal of the provisions of Sections 1-7 of Article 35 of the Negotiated Agreement between the Watervliet Arsenal and National Association of Government Employees--Local R2-98 ("CBA") supports the contentions of the appellant and his designated representative. Appeal File,

Tab 4, Vol. IV, Subtab 3, pp. 59-63. Sections 1-7 of Article 38 of the CBA establishes specific procedures which must be followed to invoke the grievance/arbitration procedures under the CBA. Neither the appellant nor his designated representative took any action which could have been interpreted as the initiation of any of these procedures. For example, Section 4 of Article 38 of the CBA provides that the grievance/arbitration procedure must be initiated as an informal grievance by submitting the complaint verbally to the employee's immediate supervisor. There is no evidence in the record that such oral submission was made or that any of the other procedural requirements of Sections 1-7 were satisfied. Accordingly, the record evidence does not support the administrative judge's finding that the appellant or his representative invoked the grievance arbitration procedure under the CBA and that finding cannot be sustained.

3. The action by the President of the Local Union initiating a contract dispute concerning the agency's failure to comply with the provisions of the CBA does not constitute an invocation of the negotiated grievance/arbitration procedure.

The administrative judge, based upon an assertion by the agency, found that the December 15, 1986 letter from Joseph F. Ventresca to the Commander of the Watervliet Arsenal constituted an invocation of the negotiated grievance/arbitration procedure on appellant's behalf. This was error.

As the Supreme Court has stated, a union can, under some circumstances, waive an individual member's statutorily protected rights, but the waiver "must be clear and unmistakable." *Metropolitan Edison Co. v. N.L.R.B.*, 460 U.S.693, 708 (1983). The Supreme Court also noted that that it is inappropriate "to infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking is 'explicitly stated.'" *Id.* Based upon our review of the CBA in question, we cannot conclude that the union clearly and unmistakably waived the appellant's statutorily protected right to appeal his removal to the Board by agreeing to the provisions of Section 8 of Article 35 which permit either the president of the local union or the base commander to initiate a "contract dispute" challenging the actions of either the union or the agency.

As pointed out by the appellant's representative, both to the administrative judge and in the petition for review, the December 15, 1986 letter initiated a "contract dispute" between the local union and the agency. *See* Appeal File, Tab 7; Petition for Review, Attachments 1 and 2. Section 8 of Article 35 of the CBA has created a procedure by which either the local union or the agency may raise and resolve issues arising between the local union and the agency concerning alleged violations of the terms of the CBA. Pursuant to Section 8 of Article 35, a contract dispute raised by the local union is to be initiated by reducing the

complaint to writing and is to be submitted by the President of NAGE Local R2-98 to the Commander. The December 15, 1986 letter in question is in full compliance with the provisions of Section 8 of Article 35.

Our review of the CBA discloses, and we find, that the procedure for resolving contract disputes between the local union and the agency is separate and apart from the individual employee's right to invoke the negotiated grievance procedures established by the CBA. Although these provisions of the CBA may result in parallel proceedings in that the union may independently challenge the propriety of an agency's action disciplining an employee because of a wide impact on the interpretation of the CBA, any other interpretation of the provisions of the CBA would be untenable. The agency agreed to such a procedure in the CBA and the procedure adopted is neither illegal nor against public policy, and this Board will enforce the provisions of the CBA. *See Giesler v. Department of Transportation*, 3 M.S.P.R. 277, 280 (1980), *aff'd sub nom. Giesler v. Merit Systems Protection Board*, 686 F.2d 844 (10th Cir. 1982).[2]

Neither appellant nor his designated representative elected to utilize the grievance/arbitration procedures

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[2] Accordingly, we need not and will not consider whether a Federal sector labor organization has the authority to waive any substantive or procedural statutory rights. *Compare Mahon v. N.L.R.B.*, 808 F.2d 1342, 1345 (9th Cir. 1987), *with Local 900, I.U.E. v. N.L.R.B.*, 727 F.2d 1184, 1190 (D.C. Cir. 1984).

established by the CBA and we conclude that the administrative judge's finding to the contrary was error. Accordingly, this appeal must be remanded to the New York Regional Office for a full adjudication and the issuance of a new initial decision.

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.